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What is the Authority of the United States, or of the President, to use the Military Power of the Federal Government under the Constitution?

The question of the authority of the United States, or of the President, under the Constitution, to use the regular army or the militia in time of peace is of great importance and is destined to grow in this respect as surely as the General Government contends for the right to invoke this extraordinary power and exercise it in the manner it was exercised by Mr. Cleveland's last administration. Freemen in the United States have always abhorred the use of military power, and have only sanctioned its use in cases of absolute necessity. It will be observed in the following pages that the discussions in the conventions related to the use of the militia for the pur-

poses provided for in the Constitution, and the ablest advocates for the use of the militia did not apprehend that the "standing army" would be called out to "execute the laws." Even Mr. Madison, who was, in a sense, the champion in the Virginia Convention of the power to call forth the aid of the militia, argued that the adoption of the provision granting the power to the General Government would do away with the great mischief of a standing army. He also asserted that the Constitution does not say that a standing army shall be called out to execute the laws.

The importance of the question has prompted me, therefore, to investigate it, and I now present the result of the investigation to the public in these pages.

Reference is frequently made herein to a public announcement of ex-Attorney General Harmon, upon the subject of discussion, simply because his statement affords an opportunity to discuss more fully some of the claims advanced in favor of the position of the General Government. I understand fully that the manifesto referred to was not, so far as known, in answer to a call from any branch of the Government

for an official opinion, but that it was promulgated more for political reasons and purposes than otherwise. It was, however, in effect, a *quasi* opinion rendered in behalf of the administration, of which the ex-Attorney General was a part.

The ex-Attorney General of the United States of the last Cleveland administration, in his public communication, declined to support the nominee and the Chicago platform, upon the ground that the National Democratic Convention, in its platform, protested against Federal interference by the use of the United States Army in the local affairs of the States, and also because the nominee of the convention for President had amplified that protest in his letter of acceptance. The then Attorney General suggested that the subject was one "of great moment, to which general attention is now directed," from which it may be inferred, to some extent, at least, that the question was regarded by him as a new one. The history of the subject shows, however, that the question has always been considered of "great moment" to American freemen. They realized its gravity and importance under the Articles of the Confederation,

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in the Constitutional Convention, in the several State Conventions, and in the public discussions in the press for and against the ratification of the Constitution of the United States. This is, indeed, far more important to the American people than any other question, and it behooves the people of the Union to ponder well the language of the late Attorney General, the attitude and acts of the administration for which he spoke, as well as all the circumstances surrounding the troubles in which the military power of the United States has been invoked against the people, the chief outcome of which has usually been the killing of a few innocent persons, and the restoration of the sway of some powerful corporation over the alleged rights and claims of the laboring men of the country ; for it is strangely strange, that the circumstances are always such that the military power will be used against the people, and, if the attempted interpretation of the unambiguous provisions of the Constitution is to prevail, the President of the United States may decide for himself just when he may order the army of the United States to march upon the people ; the very power, as will be shown further on, which the

framers of the Constitution restricted, by adding the condition that the United States should protect the States against domestic violence on application of the legislature, or of the Executive of the State when the legislature could not be convened.

The late Attorney General boldly admits that the President, without the application of the legislature, or of the Executive of the State, and in some instances against his protest to the contrary, forcibly suppressed, with the United States army, "riotous disorders," which had, it is alleged, stopped the carriage of the mails and interstate commerce, and were defying the civil officers of the United States. It will be observed that the most dangerous part of the claim is that the President may exercise such power "upon his own judgment alone." If he can do this, the second clause of section 4 of Article IV of the Constitution means nothing, inasmuch as there will scarcely be a case of domestic violence in which the President may not interfere with the army, without an application from the legislature or executive of the State, or from any source whatever. The contention practically elimi-

nates the clause from the Constitution and imposes upon its framers the imputation of having done a vain and foolish thing. But it was never intended to confer upon the President any such power, and I feel safe in stating that no President has ever acted upon any such construction of the Constitution, unless it was done in the instance referred to by the late Attorney General. In fact, there has not been recorded in the history of the Union a case in which the military forces of the United States have been used, upon the judgment of the President alone, to suppress "domestic violence," until it was done by Mr. Cleveland's last administration. Whenever the army has been used, actual armed insurrection or rebellion existed, and the proclamation of the President recited the fact. The statute authorizing the President to invoke the military power in cases of insurrection or rebellion was, and is in my judgment, founded on the clause in section 8 of Article I, which authorizes Congress to provide for calling forth the *militia* to execute the laws of the Union, suppress insurrections, and repel invasions, and not on section 4 of Article IV, which applies to invasions and domestic

violence, and not to insurrections. The Congress alone provides for dealing with insurrections. The President is given exclusive power to deal with invasions, for excellent reasons. But the President has been given the authority to deal with "domestic violence" only when applied to for assistance by the legislature or executive of the State in which the violence exists. In the alleged "riotous disorders" at Chicago and elsewhere, the President attempted, no doubt, to follow in the footsteps of President Washington, who acted in a case of actual insurrection, in relying on a notification from a district judge and marshal to the effect that warrants could not be served by the civil authorities; but there is now no statute requiring any such notification, or authorizing the President to act upon it. And the action of President Washington in Pennsylvania, in 1793, can not be claimed as a precedent for such acts, for the reason that he proceeded to suppress an armed, organized insurrection against the revenue laws of the United States. It was a case of insurrection, not of domestic violence. Insurrection and rebellion may be, in their ordinary acceptation, interchangeable terms.

The former is a rebellion of citizens or subjects of a country against its government to prevent, by force of arms, the enforcement of its laws. The latter is the taking up of arms traitorously against the government by an organized uprising for the purpose of overthrowing or coercing the lawful ruler of the government by force. Domestic violence does not fall within either of these definitions. It is not directed against the government, and is not intended to overthrow it or its laws, but it is directed against other individuals or against corporations to redress supposed individual grievances, and for the purpose of obtaining alleged private rights. It is not an armed force or warfare, and its object has never been, so far, to overthrow or coerce governments.

But let us go to the records to ascertain the history and meaning of section 4 of Article IV of the Constitution. The several drafts or plans of a Federal Constitution presented to the Convention, according to Mr. Madison's Minutes, contained provisions upon the subject now under discussion. The section as adopted grew out of separate propositions and contains two distinct clauses, although it is very evident that Mr. Ran-

dolph intended to cover the whole subject by his original resolution, which now forms the first clause of the Article. The resolution as presented to the Constitutional Convention, read as follows :

"That a republican constitution and its existing laws ought to be guaranteed to each State by the United States."

After some discussion it was found that the resolution did not meet the approval of the Convention, chiefly because it was not considered advisable to guarantee the existing laws in some of the States. Mr. Wilson moved a substitute, which was adopted *nem. con.* It read as follows :

"That a republican form of government shall be guaranteed to each State, and that each State shall be protected against foreign and domestic violence."

But the most important discussion upon the subject arose in the Constitutional Convention when it reached the proposed clause which read as follows :

"To subdue a rebellion in any State on the application of its legislature."

A motion was made by Mr. Pinckney and seconded by Mr. Morris, to strike out the words, "on the application of its legislature."

Mr. Martin and others opposed the motion because it gave the United States a dangerous and unnecessary power, and contended that the consent of a State ought to precede the introduction of any extraneous force whatever.

Mr. Ellsworth argued that in many cases the General Government ought not to interfere unless called upon.

Mr. Gerry was against letting loose the myrmidons of the United States on a State without its own consent. He thought the States would be the best judges in such cases.

It appears from the Minutes that the clause was finally amended to read: "To subdue a rebellion in any State, on the application of its legislature, *or without it when the legislature can not meet;*" but the motion to adopt the amended clause was lost.

When the Convention considered the report of the Committee of Detail, Article XVIII, which is now substantially section 4 of Article IV of the Constitution, read as follows:

"The United States shall guarantee to each State a republican form of government, and shall protect each State against foreign invasions, and, on the application of its legislature, against domestic violence."

The word "foreign" was stricken out of the Article as superfluous, being implied in the term "invasions."

Mr. Dickinson moved to strike out "on the application of its legislature, against." He and Mr. Dayton both thought it of essential importance to the tranquillity of the United States that they should in all cases suppress domestic violence, but the motion was lost, three States voting for it and eight against it. On motion of Mr. Dickinson, the words "or Executive" were added after "application of its legislature."

Subsequently, the words, "when the legislature can not be convened," were inserted, and the section, after having undergone revision by the Committee on Style and Arrangement, was adopted as it now appears in the Constitution, to wit:

"The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion, and on application of the legislature or of the executive (when

the legislature can not be convened), against domestic violence."

The section quoted above is taken from the Revised Statutes of the United States, and by comparing it with the original of Mr. Madison it will be found that alterations have been made in the punctuation, and in one instance in the phraseology.

The power of the Executive under the first clause of section 4 of Article IV, which applies to invasion, can not be doubted, and does not fall within this discussion. The people's interests are comprehended in the second clause, the original scope of which was to grant power to the United States to suppress rebellion in any State upon application of its legislature, but, as finally adopted, guarantees to the States protection against domestic violence, on application of the legislature or of the executive.

In the draft of the Constitution, according to Elliott's Debates, reported by a committee of five, the following paragraphs in relation to the powers of the legislature of the United States appear in Article VII, section 1:

"1st. To subdue a rebellion in any State on the application of its legislature."

"2d. To call forth the aid of the militia, in order to execute the laws of the Union, enforce treaties, suppress insurrections, and repel invasions."

These paragraphs are taken from Mr. Pinckney's draft of a Federal Government.

On August 23, 1787, the first part of the 18th clause of the 1st section of the 1st Article was amended by an affirmative vote to read as follows: "To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions." And this paragraph is retained in section 8 of the revised draft of the Constitution, reported September 12, 1787, by the Committee of Revision.

This is an opportune time to make reference to the views annunciated by statesmen in the State Conventions that met to adopt or reject the Constitution. The references are to Elliott's Debates.

No extended argument took place in the debate in the Convention of the Commonwealth of Massachusetts on the adoption of the Federal Constitution upon the

paragraphs now under consideration. Slight reference was made to the fact that the United States guaranteed to each State a republican form of government, but the question was not discussed at any length.

No especial mention is made of these paragraphs in the debates in the Conventions on the adoption of the Federal Constitution of the States of Connecticut and New Hampshire.

In the debates in the State of New York on the adoption of the Federal Constitution, the paragraphs are referred to several times. Mr. Smith said, among other things concerning classes of society, by way of quotation from the Marquis Beccaria, as follows: "In every human society there is an essay continually tending to confer on one part the height of power and happiness, and to reduce the other to the extreme of weakness and misery. The intent of good laws is to oppose this effort, and to diffuse their influence universally and equally." Mr. Treadwell referred to the paragraph which guaranteed to the several States a republican form of government, and opposed its adoption upon the ground that it swallowed up the whole power of sovereignty of

the State government as well as the liberties of the people.

In the debates in the Convention of the State of Pennsylvania on the adoption of the Federal Constitution, Mr. Wilson argued in favor of the power of the United States to raise and keep up an army in time of peace, and referred to the then existing commotions in the State of Massachusetts. He also argued in favor of the clause authorizing Congress to make laws for the calling out of the militia to execute the laws of the Union, suppress insurrections, and repel invasions.

The question was ably and interestingly debated in the Virginia Convention. Patrick Henry said: "Did you ever read of any revolution in a nation, brought about by the punishment of those in power, inflicted by those who have no power at all? You read of a riot act in a country which is called one of the freest in the world, where a few neighbors can not assemble without the risk of being shot by a hired soldiery, the engines of despotism. We may see such an act in America."

Mr. Madison said, in reply: "But the honorable member sees great danger in the provision concerning

the militia. This I conceive to be an additional security to our liberty, without diminishing the power of the States in any considerable degree. It appears to me so highly expedient that I should imagine that it would have found advocates even in the warmest friends of the present system. The authority of training the militia, and appointing the officers, is reserved to the States. Congress ought to have the power to establish a uniform discipline throughout the States, and to provide for the execution of the laws, suppress insurrections, and repel invasions: these are the only cases wherein they can interfere with the militia; and the obvious necessity of their having power over them must convince any reflecting mind."

Mr. Clay wished to be informed why the Congress were to have power to provide for calling forth the militia, to put the laws of the Union into execution.

Mr. Madison supposed the reasons of this power to be so obvious that they would occur to most gentlemen. If resistance should be made to the execution of the laws, he said, it ought to be overcome. This could be done only in two ways—either by regular forces or

by the people. By one or the other it must unquestionably be done. If insurrections should arise, or invasions should take place, the people ought unquestionably to be employed, to suppress and repel them, rather than a standing army. The best way to do these things was to put the militia on a good and sure footing, and enable the government to make use of their services when necessary.

Mr. GEORGE MASON. "Mr. Chairman, unless there be some restrictions on the power of calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions, we may very easily see that it will produce dreadful oppressions. It is extremely unsafe, without some alterations. It would be to use the militia to a very bad purpose, if any disturbance happened in New Hampshire, to call them from Georgia. This would harass the people so much that they would agree to abolish the use of the militia, and establish a standing army. I conceive the General Government ought to have power over the militia, but it ought to have some bounds. No man has a greater regard for the military gentlemen than I have. I ad-

mire their intrepidity, perseverance, and valor. But when once a standing army is established in any country the people lose their liberty. When, against a regular disciplined army, yeomanry are the only defence — yeomanry, unskillful and unarmed — what chance is there for preserving freedom?"

Mr. MADISON. "Mr. Chairman, I most cordially agree with the honorable member last up, that a standing army is one of the greatest mischiefs that can possibly happen. It is a great recommendation for this system, that it provides against this evil more than any other system known to us, and, particularly, more than the old system of confederation. The most effectual way to guard against a standing army is to render it unnecessary. The most effectual way to render it unnecessary is to give the General Government full power to call forth the militia, and exert the whole natural strength of the Union, when necessary. * * * And can anything be more demonstrably obvious than that laws ought to be enforced if resisted, and insurrections quelled, and foreign invasions repelled? But, it is asked, 'Why has not the Constitution declared

that the civil power shall be employed to execute the laws?' Has it said that the civil power shall not be employed? The civil officer is to execute the laws on all occasions, and, if he be resisted, this auxiliary power is given to Congress of calling forth the militia to execute them, when it shall be found absolutely necessary.

"From his (Patrick Henry's) argument on this occasion, and his eulogium on the executive magistrate of Britain, it might be inferred that the executive magistrate here was to have the power of calling forth the militia. What is the idea of those gentlemen who heard his argument on this occasion? Is it not that the President is to have this power—that President who, he tells us, is not to have those high feelings and that fine sensibility which the British monarch possesses? No, sir. The President is not to have this power. God forbid we should ever see a public man in this country who should have this power! Congress only are to have the power of calling forth the militia." (Nicholas.)

Mr. Clay was not, however, convinced that the civil

power would be employed. If it was meant that the militia would not be called out to execute the laws in all cases, why were they not satisfied with the words, "repel invasions, suppress insurrections." He thought the word *insurrections* included every opposition to the laws ; and if so, it would be sufficient to call them forth to suppress insurrections, without mentioning that they were to execute the laws of the Union. He added that, although the militia officers were appointed by the State governments, yet, as they were sworn to obey the superior power of Congress, no check or security would result from their nomination of them.

Mr. MADISON. "Mr. Chairman, I can not think that the explanation of the gentleman last up is founded in reason. It does not say that the militia shall be called out in all cases, but in certain cases. There are cases in which the execution of the laws may require the operation of militia which can not be said to be an invasion or insurrection. There may be a resistance to the laws which can not be termed an insurrection."

Mr. Clay wished to know the instances where an opposition to the laws did not come within the idea of an insurrection.

Mr. Madison replied that a riot did not come within the legal definition of an insurrection. There might be riots, to oppose the execution of the laws, which the civil power might not be sufficient to quell. This was one case, and there might probably be other cases. He referred to the candor of the committee, whether the militia could ever be used to destroy themselves.

With respect to calling the militia to enforce every execution indiscriminately, it is unprecedented. Have we ever seen it done in any free country? Was it ever so in the mother country? It never was so in any well-regulated country. It is a government of force, and the genius of despotism expressly. It is not proved that this power is necessary; and if it be unnecessary, shall we give it up? (Henry.)

Was there ever a constitution in which, if authority was vested, it must not have been executed by force, if resisted? Was it not in the contemplation of this State, when contemptuous proceedings were expected, to recur to something of this kind? How is it possible to have a more proper resource than this? That the laws of every country ought to be executed, can not be denied. Can any government be established, that will

answer any purpose whatever, unless force be provided for executing its laws? The Constitution does not say that a standing army shall be called out to execute the laws. Is not this a more proper way? The militia ought to be called forth to suppress smugglers. Will this be denied? (Madison.)

For Continental purposes Congress may call forth the militia—as to suppress insurrections and repel invasions. But the power given to the States by the people is not taken away; for the Constitution does not say so. (John Marshall.)

The State governments are to govern the militia when not called forth for general national purposes; and Congress is to govern such part only as may be in the actual service of the Union. Nothing can be more certain and positive than this. It expressly empowers Congress to govern them when in the service of the United States. It is, then, clear that the States govern them when they are not. With respect to suppressing insurrections, I say that those clauses which were mentioned by the honorable gentleman are compatible with a concurrence of the power. By the first, Congress is

to call them forth to suppress insurrections, and repel invasions of foreign powers. A concurrence in the former case is necessary, because a whole State may be in insurrection against the Union. What has passed may perhaps justify this apprehension. (Madison.)

The fourth section of the fourth article contains nothing to warrant the supposition that the States can not call them forth to suppress domestic insurrections. All the restraint here contained is, that Congress may, at their pleasure, on application of the State legislature, or (in vacation) of the executive, protect each State against domestic violence. This is a restraint on the General Government not to interpose. The State is in full possession of the power of using its own militia to protect itself against domestic violence ; and the power in the General Government can not be exercised, or interposed, without the application of the State itself. This appears to me to be the obvious and fair construction. (Pendleton.)

Pending the ratification of the Constitution by the States the subject of conferring power on the United States to execute the laws by military force was dis-

cussed, and the contention was made against such power that no provision was made in the proposed Constitution for calling out the *posse comitatus* to assist the magistrates in the discharge of their duty, and that the military force was intended thereby to be their only auxiliary. Mr. Hamilton treated these objections to the Constitution as absurd, upon the ground that the aid of the *posse comitatus* was fully authorized by the Constitution. And it may be remarked that the statutes of the United States, in force at the time of the occurrence of the disorders referred to by the late Attorney General, authorized the persons appointed by Commissioners of the Circuit Courts of the United States to serve warrants and other process, to summon and call to their aid, in the first instance, the bystanders, or *posse comitatus*. (Rev. Stats., sec. 1984.) The marshal of the United States, and his general and special deputies, are authorized and empowered to summon and call to their aid, in the discharge of their duties, the bystanders or *posse comitatus* of the judicial district. (Rev. Stats., sec. 2024.) And the *posse comitatus* is allowed to the marshal in executing process in the Indian country.

(Rev. Stats., sec. 2153.) By the act of June 18, 1878 (20 Stats., 145), making appropriations for the support of the army, it is provided, that from and after the passage of the act it shall not be lawful to employ any part of the army of the United States, as a *posse comitatus* or otherwise, for the purpose of executing the laws, except in cases and under circumstances expressly authorized by the Constitution or by act of Congress.

On all former like occasions in the history of the Union the *posse comitatus*, aided by the State militia, has been ample to suppress "domestic violence," as distinguished from insurrection and rebellion, and no doubt if this power had been properly used at Chicago it would have been sufficient to arrest the offenders and quell the disturbance. But when a civil officer feels that the military will come to his aid in case of emergency, he naturally becomes lax in the discharge of his duty.

The legislators in the second and third Congresses evidently understood what the Constitution meant, and, excepting in one particular, hereafter noted, substantially followed its language in enacting statutes pur-

suant thereto for calling out the militia to suppress insurrection in a State. And in providing for the use of the militia whenever the laws of the United States were opposed, or their execution obstructed, in a State, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the power vested in the marshals by law, the President might, upon notice to that effect, from an associate justice or the district judge, call out the militia to suppress the combination and enforce the laws. (1 Stats., 424, ch. 36, 1795; also p. 246, ch. 28.) The power to employ the land and naval forces of the United States in cases of insurrection was authorized by the act of March 3, 1807 (2 Stats., 443, ch. 39), the President "having first observed all the prerequisites of the law in that respect." Section 5297 of the Revised Statutes is based upon those acts of Congress, and reads as follows:

"In case of an insurrection in any State against the government thereof, it shall be lawful for the President, on application of the legislature of such State, or of the executive, when the legislature can not be con-

vened, to call forth such number of the militia of any other State or States, which may be applied for, as he deems sufficient to suppress such insurrection ; or, on like application, to employ, for the same purposes, such part of the land or naval forces of the United States as he deems necessary."

And notwithstanding some of the provisions of the earlier statutes which guarded the people's interests do not appear in the present statute, yet such provisions may be referred to for the purpose of ascertaining the legal history of the power of the authorization to use the military force, and the extent of that power, as well as for the proper interpretation of the existing section of the statute which is derived therefrom.

In view of the expressions of the earliest acts of Congress, it is safe to arrive at the conclusion that it was never intended that the militia, or land and naval forces, should be used by the President in any event until the civil courts of the United States, and the marshal, with his *posse comitatus*, had exhausted their power and failed to suppress the unlawful and powerful combination or insurrection ; and when the crisis was

reached the President's power to act depended upon a notification from an associate justice or district judge; in no instance was he authorized to act on his own judgment.

It was in the act for the suppression of the rebellion that the alleged power to act on his own judgment was first conferred on the President. The act is very peculiar from the fact that it makes the President the judge as to when it shall become impracticable for a co-ordinate branch of the Government, by the ordinary course of judicial proceedings, to enforce the laws of the United States within any State or Territory of the United States. (12 Stats., 281, sec. 1, ch. 25.) This is now section 5298 of the Revised Statutes, which reads as follows:

"Whenever, by reason of unlawful obstructions, combinations, or assemblages of persons, or rebellion against the authority of the Government of the United States, it shall become impracticable in the judgment of the President to enforce, by the ordinary course of judicial proceedings, the laws of the United States within any State or Territory, it shall be lawful for the

President to call forth the militia of any or all the States, and to employ such parts of the land and naval forces of the United States as he may deem necessary to enforce the faithful execution of the laws of the United States, or to suppress such rebellion, in whatever State or Territory thereof the laws of the United States may be forcibly opposed, or the execution thereof forcibly obstructed."

The law, in effect, authorizes the President to put his own judgment above that of the judiciary, and determine whether or not it is practicable or impracticable for that branch of the Government to proceed "by the ordinary course of judicial proceedings." There may have been times during the rebellion when a President could have exercised his judgment in this respect without hesitation, or probably without being subject to criticism, but no doubt his judgment and the statute were both applied to sections of the United States in which, at the time, there was, strictly speaking, no "ordinary course of judicial proceedings" in the courts of the United States. This may have happened during the war of the rebellion, but no one has heard of a

President exercising his judgment in this respect against the courts of the United States in time of actual peace. If, therefore, the President used the military force in suppressing the "riotous disorders" referred to, because, in his judgment, it was impracticable for the courts of the United States to enforce the laws by the ordinary course of judicial proceedings in time of peace, the time has come for American citizens to make confession of the failure of civil government.

There is not, to my knowledge, a single instance, from the ratification of the Constitution, and the laws passed pursuant thereto, to the actual war of the rebellion, in which an Executive of the United States used the military force to suppress insurrection or domestic violence, except upon application of the proper State or other authority. His sole judgment in such cases was exercised *after* such applications were made, and not *before;* and in one of the most noted cases in the history of the Union, which occurred in Rhode Island, he did not call out the militia, although he had exercised his judgment and determined to do so upon the application of the governor of the State who had

been recognized by him in the controversy between contending claimant's to the governor's office.

The history of the legislation upon the subject clearly shows that it was never intended to give the President authority to use the military power of the United States upon his sole judgment, except in cases of invasion, or of imminent danger of invasion. In order to give him such authority, the courts, which are the foundation and source of civil government, must be abolished by insurrection, or so overthrown that they are unable to proceed with ordinary judicial proceedings.

Notwithstanding the omissions from section 5298 of the Revised Statutes of the provisions of the original enactments of Congress, which carefully guarded the rights of the States and the people against the encroachment of the military power of the United States upon the civil authorities, there is enough left in the statute to indicate that it was not the intention to confer absolute authority upon the President in that respect. The courts must be stopped in their ordinary proceedings before he can act—that is, he must so adjudge. If section 5298 is constitutional, the President is at the same

time the Executive, the commander-in-chief of the army and navy, and the general supervisor over the courts of the Union, both in war and in peace. What a portentous claim for executive power in a republican government having only limited delegated powers and distinct co-ordinate branches! No wonder the constitutionality of this part of section 5298 is questioned. The only vestige of the guarded provisions of the former statutes in favor of civil government that remains, is that which refers to the courts, and that, if the section is constitutional, gives the President the right to wipe them out if he so adjudges.

It will be observed that section 5298, or its antecedent, became a law on July 29, 1861, and had for its immediate purpose the suppression of a rebellion already in existence. The bombardment of Fort Sumter had taken place and the President had fixed the 19th of April, 1861, as the beginning of the war of the rebellion by a proclamation. Ordinances of secession were adopted by the seceding States, and State governments were set up against the authority of the United States, and an army organized and put in the

field to sustain them. An application from the legislature or executive of either of the seceding States was impossible, from the fact that the legislatures and executives had gone with the seceding States and continued the same State governments, and made them antagonistic to the Union. The rebellion was of such magnitude that, by judicial determination, it did not end until 20th August, 1866. Actual hostilities existed until General Lee surrendered. The ex-Attorney General refers to the rebellion as a precedent for the President to use the military force without restraint or limitation, to suppress "riotous disorders," which did not contain a single element of rebellion towards the United States or their laws. Could a more absurd attempt at either a direct or implied precedent be imagined?

The Supreme Court, in its opinion in the Milligan case (4 Wall., 2), wherein the provisions of the act of March 3, 1863 (12 Stats., 755), relating to *habeas corpus*, and regulating judicial proceedings in certain cases, were drawn in question, has announced in unmistakable terms, by its opinion delivered by Justice David Davis of Illinois, when and where martial law may be

declared, and when the use of the military power may be invoked, in time of war and in time of peace. And the court, in considering the questions involved in the case, says :

"The importance of the main question presented by this record can not be overstated; for it involves the very framework of the Government and the fundamental principles of American liberty.

"During the late wicked rebellion the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question. *Then*, considerations of safety were mingled with the exercise of power ; and feelings and interests prevailed which are happily terminated. *Now* that the public safety is assured, this question, as well as all others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment. We approach the investigation of this case fully sensible of the magnitude of the inquiry and the necessity of full and conscious deliberation."

* * * * * * *

"In interpreting a law the motives which must have operated with the legislature in passing it are proper to

be considered. This law was passed in a time of great national peril, when our heritage of free government was in danger. An armed rebellion against the national authority, of greater proportions than history affords an example of, was raging ; and the public safety required that the privilege of the writ of *habeas corpus* should be suspended."

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"No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people ; for it is the birthright of every American citizen when charged with crime to be tried and punished according to law. The power of punishment is alone through the means which the laws have provided for that purpose, and if they are ineffectual, there is an immunity from punishment, no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country or endangered its safety. By the protection of the law human rights are secured ; withdraw that protection and they are at the mercy of wicked rulers or the clamor of an excited people."

The claim for unrestrained power of the military commander, even in time of war, to suspend all civil

rights and their remedies, according to his own judgment, and subject all citizens as well as soldiers to the rule of his will, is characterized by the Supreme Court in the same opinion, as follows:

"If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the Executive, substitute military force for and to the exclusion of the laws, and punish all persons as he thinks right and proper, without fixed or certain rules.

"The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guarantee of the Constitution, and effectually renders the 'military independent of and superior to the civil power'—the attempt to do which by the King of Great Britain was deemed by our fathers such an offence that they assigned it to the world as one of the causes which impelled them to declare their independence. Civil

liberty and this kind of martial law can not endure together ; the antagonism is irreconcilable, and, in the conflict, one or the other must perish."

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" It follows, from what has been said on this subject, that there are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to the law, then, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority thus overthrown, to preserve the safety of the army and society ; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration ; for if this government is continued *after* the courts are reinstated, it is a gross usurpation of power."

The interpretation of the provisions of the act of Congress relating to *habeas corpus* may be applied with equal force to the interpretation of the act of July 29, 1861 (now section 5298 of the Revised Statutes), for they were both enacted for the same purpose—the suppression of the rebellion.

As previously stated, there can be no controversy about the power of the President, under the first clause of section 4 of Article IV of the Constitution, and under section 5297 of the Revised Statutes, to use the army according to his own judgment in cases of invasion, or contemplated invasion. That section of the statute, both in its original and present form, contains two separate and distinct clauses, and conforms to the constitutional provisions in that respect. These clauses have been passed upon by the Supreme Court. Mr. Justice Story has held that the power conferred on the President by the Constitution and enactments of Congress, under the first clause, makes him the exclusive and final judge whether the exigency has arisen for the use of the army in cases of invasion. But he also says: "The power confided by Congress to the President is, doubtless, of a very high and delicate nature. A free people are naturally jealous of the exercise of military power; and the power to call the militia into actual service is certainly felt to be one of no ordinary magnitude." * * * "It is, in its terms, a limited power, confined to cases of actual invasion, or of imminent danger of invasion."

It is important to observe how carefully and cautiously a great jurist, in announcing the opinion of the Supreme Court in 1827, referred to the exercise of the President's power, even in cases of invasion.

The second clause of the same section and Article of the Constitution, and the legislation upon the subject, were considered by the Supreme Court at its December term, 1848, in Luther *v.* Borden (7 Howard, 1, 44, 45). Mr. Chief Justice Taney delivered the opinion in the case, and says:

"A question very similar to this arose in the case of Martin *v.* Mott (12 Wheat., 29–31). The first clause of the first section of the act of February 28, 1795" (now part of section 5297, Revised Statutes), "of which we have been speaking, authorizes the President to call out the militia to repel invasion. It is the second clause in the same section which authorizes the call to suppress an insurrection against a State government. The power given to the President in each case is the same, with the difference only, that it can not be exercised by him in the latter case, except upon the application of the legislature or executive of the State."

Nothing can be more refreshing or wholesome in this connection than a perusal of the dissenting opinion of

Mr. Justice Woodbury (Luther *v.* Borden, *ib.*, 48), in which he reviewed the English and American law upon the subject of martial law and the use of the army in aid of the civil authorities, including the constitutional provisions and the original statutes herein mentioned. A few excerpts from his dissenting opinion will not be out of place here.

"Under our present Constitution, the first, if not nearest, precedent in history, as to the course proper to be followed in any State insurrection, is Shays' rebellion in Massachusetts. Having occurred in 1787, before the formation of the Federal Constitution, and having been suppressed by the State alone, under its own independent authority, * * * it was untrammelled by any of the provisions now existing about war and insurrection in that Constitution. But the course on that occasion is full of instruction and proof as to what was deemed the legal use of the militia by the State, when thus called out, under the old Confederation, and the rights of force incident to a State on a rebellion within its limits. We have before shown that the provisions in the old Confederation as to war were much the same in substance as in the present Constitution. Now, in

Shays' rebellion, the resort was not first had at all to the military, but to the civil power, till the courts themselves were obstructed and put in jeopardy."

* * * "The writ of *habeas corpus* was merely suspended for a limited time, and the military ordered to aid in making arrests under warrants, and not by military orders. They were directed to protect civil officers in executing their duties, and nothing more, unless against persons when actually in the field obstructing them."

And in another part of the opinion, the eminent justice, after having reviewed section 4, Article IV of the Constitution, and the acts of Congress, said:

"Under these views and restrictions, the States have succeeded well, thus far—over half a century—in suppressing domestic violence in other ways than by martial law. The State courts, with the aid of the militia, as in Shays' rebellion and the Western Insurrection, could, for aught which appears, by help of the *posse comitatus*, or at least by that militia, have in this case dispersed all opposition. They did this in both of those instances, so much more formidable in numbers, and made no resort to martial law. (Minot's History, 163,

178.) In one of them, not even the writ of *habeas corpus* was suspended by the State, and never by the United States, though empowered to do that in dangerous emergencies. (2 Kent's Com., 24; 2 Story's Com. on Const., sec. 1335.) But if civil process, aided by the militia, should fail to quell an insurrection against State laws, which has never yet happened in our history, then appeal lies, and is appropriate, to the General Government for additional force before a resort can be had to supposed belligerent rights, much less to any exploded and unconstitutional extremes of martial law."

In the insurrection in Pennsylvania against the laws of the United States, in 1793, where rebellion, violent resistance, and even treason were committed, martial law was not declared, nor was the writ of *habeas corpus* suspended, but the militia was called out on the application of the district judge and the marshal, in accordance with the statute then in force, to co-operate with the civil authorities, who had proved insufficient to execute the warrants issued, without military aid. The Secretary of War issued an order stating that the object for which the troops were sent was to assist the mar-

shal in arresting offenders under criminal process. And the President constantly enjoined a subordination of the military to the civil power, and accompanied the militia in person to see that the laws were respected ; and gave assurance, says the historian, "that the army should not consider themselves as judges or executioners of the laws, but as employed to support the proper authorities in the execution of them." But George Washington happened to be President at that time. Probably he did not know when or how to use the military force under the Constitution and laws. A similar course was pursued in arresting offenders in the Burr conspiracy. One or two arrests were made by the military without oath and warrant, but the persons were immediately released on *habeas corpus*.

The "riotous disorders," except Shays' rebellion, took place, excepting as herein noted, under the same statutes that are in force to-day ; for the first section of the act of May 2, 1792, is identically the same as the first section of the act of February 28, 1795, which repeals the former act entirely, and which, with the act of March 3, 1807, forms the basis of section 5297 of the

Revised Statutes. And the provisions of the second section of the act of 1792 are superseded by the same section in the act of 1795, which dispenses with the notice to the President by the associate justice or district judge ; and in carrying this section into the act of July 29, 1861, its phraseology is materially changed, and the provision relating to marshals is omitted. This is now section 5298 of the Revised Statutes.

It is important to ascertain the intention of the framers of the Constitution, and their real acts, in limiting the power delegated to the President or to the United States to use the militia. There is no doubt there were members of the Convention who desired to give the President absolute authority to use the army in all cases, regardless of the rights of the States. Some of these persons were evidently sent to Congress and proceeded to do there what the Constitutional Convention had refused to do ; for in all of the acts of Congress may be found the following words : "against the government thereof," referring to the State governments. If the act of the Constitutional Convention, in rejecting this very language, is of any value, then there

may be a question as to whether there is any warrant for placing it in the acts of Congress. In the consideration of the original resolution, "to subdue a rebellion in any State," etc., Mr. Madison and Mr. Dickinson moved to insert, after State, "against the government thereof," which was agreed to *nem. con.*, but upon the final discussion and vote, the clause as amended was rejected, and the words never appeared in the discussions afterwards; and the closeness of the vote, which, according to Mr. Madison, was a tie, is an assurance that the question was fully discussed and duly considered by the Convention. And the provision was adopted in its present general terms, without making any distinction whatever as to whether the domestic violence should exist against the State or the Nation. A case of domestic violence can scarcely be mentioned, or imagined, which does not affect both governments; but it is primarily against the State government, whose duty it is to suppress it, and when, in its judgment, it is powerless to do so, the assistance of the President may be asked to aid the civil authorities in suppressing the violence. The framers of the Constitution under-

stood this thoroughly, and said that no extraneous force whatever should be permitted to go into a State without its consent for any purpose whatever, and limited the power of the President to act upon the application of the legislature or executive of the State accordingly. Congress has been given ample power, under section 8 of Article I, to suppress insurrections, repel invasions, and execute the laws of the Union. By the first clause of section 4, Article IV, the United States has been given ample authority to protect the States against invasion from Indian tribes or foreign nations. By the second clause of section 4, Article IV, power has been given to the United States to protect the States against domestic violence, upon the application of the legislature or executive, but not otherwise; and the application of the legislature or executive of the State for Federal assistance is not confined to domestic violence against the State alone, but to domestic violence generally, according to the action of the Constitutional Convention.

The Government of the United States is not authorized to use the army except in such cases as are men-

tioned in the Constitution. It has no implied power in the premises, but only such power as has been actually delegated to it by the States It is a question whether the power has been granted, not of its lack of prohibition.

There is no doubt of the sovereignty of the United States throughout the Union, but it is, in the first instance, at least, a civil sovereignty as contradistinguished from a military sovereignty. The claim that the President can send the army into the States for the suppression of domestic violence, whether against the laws of the United States or the State, or both, excepting upon an application of some one authorized to make it, has never been conceded, and will not now be accepted by the people, *sub silentio.* And when the army is properly brought into service its duty is to assist the civil authorities to arrest offenders and violators of the laws upon process issued from the civil courts, and not to make arrests by virtue of military power or orders, or to shoot people indiscriminately. It will not do to argue that, because our system of government is dual, the United States may invade the

States with an army regardless of their sovereign rights, whenever, in the judgment of the President, he decides to do so, to enforce the laws of the United States, or to disperse assemblages, which, according to his judgment, are obstructing such laws, unless such assemblages consist of armed insurrectionists against the laws of the United States. If this can be done, in the mode contended for, then the provision in the Constitution which guarantees to every State in the Union a republican form of government and protection from invasion has become, or may become, a nullity by the acts of the Federal Government itself, which may by its own acts break down and destroy such guarantee by military force.

But grant that the United States, or the President, has the power, coextensive with the Union, to employ military force against unlawful combinations or assemblages of persons for violating or obstructing the laws of the United States, does it follow, or has it ever heretofore been claimed, that the President was unrestricted in the exercise of that power, and that his will was absolute, in using such force even in cases of insurrec-

tion. All the precedents are antagonistic to any such claim. The legal history of the United States is opposed to it. The acts of the Government in the suppression of the rebellion are not apt antecedents upon which to found a precedent for the suppression of mere domestic violence, whether it be against the State or the United States. The ex-Attorney General says the President is authorized to employ the armed forces of the United States, under section 5298, "upon his own judgment alone," against unlawful obstructions, combinations, or assemblages of persons. He reads the statute, therefore, without the words, "whenever * * * it shall become impracticable, in the judgment of the President, to enforce, by the ordinary course of judicial proceedings, the laws of the United States." This clause in the section has important antecedents and connections in the prior statutes. It shows, too, that the courts and civil authorities have not been entirely abandoned, and that the President should respect them to some extent in forming his judgment concerning the use of the military forces. If, however, he can do as he pleases,

"upon his own judgment alone," then this is no longer a civil government, but we are practically living under military rule, and the government may, without very much ceremony, be turned into a military despotism.

If the President can, arbitrarily, "upon his own judgment alone," use the military forces to suppress domestic violence in a State, against its protest, because interstate commerce laws or postal laws are being indirectly obstructed, upon the ground that the "riotous disorders" are against the laws of the United States as well as against the laws of the State, where and when does the power of the President in this respect end? If this proposition is carried to its legitimate, or rather its *illegitimate* result, there are numerous instances in which the power can be exercised in the every-day occurrences of life. It may be said that it will not be resorted to in trivial governmental affairs. Mr. Hamilton thought the objection that the *posse comitatus* would be supplanted by the military was absurd, but, if the contention of Mr. Cleveland's last administration is correct, it has come to pass nevertheless. And as the

late Attorney General has based his argument upon a most doubtful precedent, the people should take care that no doubtful precedents in the use of the army in time of peace are established that affect their rights. The merest subterfuge is often claimed as the ground for a precedent. The people should be jealous of breaches of the fundamental laws of the nation. All such breaches, even "though dictated by necessity, impair that sacred reverence which ought to be maintained in the breast of rulers toward the Constitution of a country, and form a precedent for other breaches where the same idea of necessity does not exist at all, or is less urgent or palpable."

HEBER J. MAY.

WASHINGTON, D. C.,

October 12, 1897.

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